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In the

Supreme Court of the United States

October Term.

No. 559

New Amsterdam Casualty Company,
Petitioner,

v.

Monroe W. Gullberg, as Administrator, etc., of Eleanor W. Gullberg, deceased.

Brief for Respondent Gullberg, in Opposition to Petition for Writ of Certiorari.

Summary Statement.

The petitioner, New Amsterdam Casualty Company, is seeking a writ of certiorari to the Court of Appeals of the State of New York, in both of the jointly captioned suits, but our presentation here is principally on behalf of the above named Monroe W. Gullberg, as administrator, etc., in the above secondly entitled action only, for the reasons hereinafter explained.

The decision sought to be reviewed was rendered by the Court of Appeals of the State of New York on October 22, 1948, and judgment of affirmance thereon was entered in the office of the Clerk of Orange County, New York,

on October 27, 1948. New Amsterdam Casualty Company (hereinafter referred to as New Amsterdam), as appellant below, moved in the Court of Appeals for re-argument, and, in the alternative, for amendment of the remittitur, but said motion was unanimously denied, by order of said Court of Appeals, entered on November 24, 1948.

This judgment of the Court of Appeals unanimously affirmed the judgment of the Appellate Division below, which, by divided court, had sustained the finding of the Trial Justice, in New York Supreme Court, County of Orange. By said initial judgment, it had been adjudicated that New Amsterdam was liable for the payment of certain judgments, by reason of its motor carrier policy of public liability insurance, covering A. Cimpi Express lines, Inc. The Trial Court expressly found that the policy in question was a statutory "Required Policy," under the provisions of the New York Public Service Law, and that, in consequence, the defenses raised by said insurance carrier could not be maintained.

Opinions Below.

The opinion of the Trial Justice, Hon. Mortimer B. Patterson, was not published in the official New York Reports, but is printed at folios 463-497 of the record below, pages 155 to 166. The majority decision of the Appellate Division, with dissenting opinion of Mr. Justice Haggerty, is reported in 272 App. Div. 1054. The decision of the Court of Appeals, with brief digest by the official reporter, appears in 298 N. Y. 693. There was no opinion by the Court of Appeals, either upon its affirmance of the judgment or its denial of the subsequent motion for re-argument and amendment of remittitur.

Facts.

On September 25, 1942, about 11 P. M. o'clock of a moonlit night, a group of young high school students were riding back from Goshen, New York, to Middletown, New York, on a horse-drawn hay wagon. They had hired the team and wagon from a farmer, and it was being driven by his employee. While the wagon was travelling westerly along Route 17, about one mile west of Goshen, New York, it was struck from the rear by a motor tractor-trailer unit, also west bound, owned by A. Cimpi express Lines, Inc., and operated by its employee, Joseph Carnicelli. The speed of the motor carrier was so great, and the impact so violent, that six of these boys and girls were killed, while many others were injured and maimed. The injured children, by their respective guardians, and the administrators of the deceased, all brought their individual tort actions against Cimpi Express Lines, and there followed the proceedings hereinafter detailed. It goes without saying that no question was raised, nor could now be raised, as to the validity of all the judgments in the initial negligence actions.

At the time of this accident, A. Cimpi Express Lines, Inc., had two policies of public liability insurance, one with American Fidelity & Casualty Co., the other with New Amsterdam Casualty Company. The "American" policy was on file with *both* the Interstate Commerce Commission and the New York Public Service Commission. The "New Amsterdam" policy had been filed only with the Public Service Commission. (It should be noted here that Cimpi Express Lines, a New York firm, was engaged as a motor carrier in *both* intrastate and interstate business, a matter to be discussed more fully in our argument.) American Fidelity eventually conceded that its policy was a "required" policy within the meaning of the applicable New York statute, and liable as such

to the extent of the coverage. New Amsterdam, however, while admitting that its said policy had originally been filed with the Public Service Commission as a "Required Policy," claimed that on September 25, 1942, it had ceased to be such a statutory policy, as to the named insured, A. Cimpi Express Lines, and therefore disclaimed liability, for the reasons set forth in the petitioner's brief.

The plaintiffs, Gullberg, *et al.*, contended that, at the time of the accident, the New Amsterdam policy was in full force and effect as a "Required Policy," covering Cimpi Express Lines under the provisions of the New York Public Service Law, and the rules and regulations of the P.S.C. This was the contention passed upon and sustained by the New York Courts, and we maintain that it was the only decisive, material and necessary issue in the case.

Although the facts passed upon in the combined record below apply equally to both cases captioned upon the petition for writ of certiorari, this brief is submitted only on behalf of the respondent Gullberg, in the second entitled case, for the following reasons: In the action for declaratory judgment brought in New York Supreme Court by American Fidelity (plaintiff-respondent) against New Amsterdam (defendant-appellant), said Monroe W. Gullberg as administrator of the Estate of his deceased daughter, Eleanor Gullberg, was necessarily joined as a co-defendant with all of the parties involved in the tragic accident from which these suits arise. However, only the New Amsterdam appealed in said first captioned suit, and defendants Gullberg, *et al.*, did not join therein. Said action involved, primarily, a dispute between the two insurance carriers covering A. Cimpi Express Lines, as to the liability and priority under their respective policies. In that equity action, Gullberg and the co-defendants were only indirectly concerned. Said questions have now

become largely academic, because of the fact that the aggregate judgments far exceed the total coverage provided by both policies, and because American Fidelity & Casualty Co., conceding its liability under *its* required policy, has paid it over pro rata to all of the judgment-creditors, amounting to 10.467 per cent of the face amount of each judgment aforesaid.

Hence, this brief is expressly on behalf of GULLBERG, as respondent here, in the second entitled action under the joint caption upon the petition for writ. This case, in which GULLBERG was plaintiff-respondent below, against New Amsterdam as defendant-appellant, was made the "test" case for the determination of the rights of all the judgment-creditors herein. Briefly summarized, the procedure in the New York courts was as follows: All of the injured parties, and the legal representatives of the six deceased children, respectively brought their individual negligence actions against A. Cimpi Express Lines, in the Supreme Court of Orange County, New York. Each respectively recovered judgments for damages, by reason of the negligence of Cimpi, the aggregate amount of the original judgments being $157,072.63 (fols. 216-220, 431-435, record below). Executions against Cimpi having been returned unsatisfied, and all of the procedural requirements of the New York statute (Sec. 167, Insurance Law of New York) having been met, all of said judgment-creditors sued New Amsterdam Casualty Company, to enforce payment under its liability policy covering Cimpi. All of said equity actions were tried jointly before Mr. Justice Mortimer B. Patterson in Orange County Supreme Court, resulting in separate judgments in favor of all said plaintiffs against New Amsterdam (October, 1945).

In this proceeding, the Court held that the New Amsterdam policy was a "Required Policy," under the pro-

visions of Article 3-B, New York Public Service Law. Hence, the "exclusion clause" in said policy was held inapplicable, because such policies, under the pertinent New York statute, *must* provide the broad coverage required as (quoting the headline of the statute) "*security for the protection of the public.*" We assume it is unnecessary here to quote Section 63-r of said statute in full, for the reason that it is set forth at pages 7-8 of the petition for writ.

Thereupon, American Fidelity and Casualty Company, having issued a similar policy to Cimpi (with maximum coverage of $20,000) conceded its liability and paid over, pro rata, to each judgment-creditor, as aforesaid. New Amsterdam, however (its policy having maximum limits of $100,000) served notice of appeal upon all of the prevailing plaintiffs. At that point, to shorten the record and simplify proceedings so far as possible, the Gullberg case was made the "test case" in the Appellate Division of New York Supreme Court, as to all the judgment-creditors similarly situated, by formal stipulation. Respondent Gullberg having prevailed in the Appellate Division, a similar stipulation was executed by all parties involved, for the record in the New York Court of Appeals (fols. 1354-1392), continuing the Gullberg case, as decisive of the rights of all other judgment-creditors similarly situated. Thus, in effect, the brief here submitted on behalf of respondent Gullberg, likewise represents the position of the plaintiffs in the twenty-five companion actions, entitled under the aforesaid stipulation.

Of course, the determination by the New York Court of Appeals, affirming the judgment in favor of plaintiff-respondent GULLBERG, also resulted in a finding in favor of A. Cimpi Express Lines, Inc., in the action by said insured against its own insurance carrier, New Amsterdam Casualty Company.

Summary of Argument.

We respectfully submit that the effect and implication of the judgment in question are not nearly so broad and sweeping as the petitioner would have it appear. It is perfectly true, of course, that the decision of the New York Court of Appeals in effect means that a New York statutory "Required Policy," in force under the rules and regulations of the Public Service Commission, should be held answerable for damages arising from such an accident within the State of New York, without regard to whether or not the same carrier also had another required policy of a different insurer, on file with the I.C.C. (In this case, it is purely coincidental that the policy of American Fidelity had been filed for A. Cimpi Express Lines with both the I.C.C. and P.S.C.) That, however, does not justify the petitioner's broader conclusion that the Court below thus held that the New York Public Service Commission has "the power to impose insurance requirements upon this interstate motor carrier over and above the insurance requirements specifically prescribed by the Interstate Commerce Commission" (quoting from page 15, Petitioner's brief). The generalizations which the petitioner thus strives to present under the caption on page 7 of its brief, and further at page 15, *et seq.*, are broader than the case warrants, and are not in accord with the applicable law. It seems, indeed, far-fetched for the petitioner to say that this decision is "fraught with dangers which, if * * * permitted to stand, may well impair the regulatory powers of the United States over interstate commerce * * *." On the other hand, if the argument of petitioner were carried to its logical conclusion, there might, indeed, be grave danger to the public, if such a motor carrier were not permitted to protect against liability with more than one policy, when operating both interstate and intrastate.

As we shall point out, the federal statute itself recognizes, and makes provision for, the regulation by each state of motor carriers operating on the highways within its own boundaries.

The respondent contends that the real question in issue here does not involve the interpretation of any federal statute, nor does it infringe upon any constitutional rights. It is merely this: Was the New Amsterdam policy a statutory "Required Policy" under the provision of the New York law, and answerable as such for this accident which occurred within the State of New York?

It is obvious that the New York court could, and did, pass upon this question, without infringing upon the jurisdiction of the I.C.C. over the motor carrier or insurer. It is true that the Cimpi truck, on its return trip from New York City to Auburn, New York, detoured into the State of New Jersey, for the purpose of picking up the remainder of a shipment of war materials, under emergency order for the U. S. Naval Base at Sampson, New York (fols. 917-918). Thus, as an abstract proposition, the return trip became "interstate" in character. This, however, did not nullify the policy, which by its very terms permitted operations outside the State of New York (Exhibit 1, Vol. 2, p. 21). Nor did it divest the New York Public Service Commission of its control over said motor carrier, "for the protection of the public," after he returned within the State of New York.

It was proper for the New York courts to treat as immaterial the allegations of New Amsterdam as to interstate commerce, because that question was not necessarily involved in the determination of the case. This subject is amplified under the following Point I.

POINT I.

None of the pertinent issues below required determination of a federal question.

The material questions of the case were entirely within the province and sphere of the New York Court. We entirely agree with the following quoted portions of petitioner's brief (pp. 5-6):

> "The crux of this case, therefore, is whether or not petitioner's policy of insurance constituted a 'required policy' for A. Cimpi Express Lines, Inc., under the Public Service Law of the State of New York, at the time of the accident. If it was such a 'required policy,' the above quoted exclusion was rendered inapplicable by the statute. If, as petitioner contends, it was not such a 'required policy' at that time, the exclusion would be effective and no liability could be imposed upon petitioner. * * * The adverse decision of the Court of Appeals of the State of New York on that point is, of course, not reviewable by this Court."

What, then, remains in the case which this Court should properly be asked to determine? The petitioner seeks to show that the New York Court necessarily found thereby that the P.S.C. had powers to supersede the jurisdiction of the I.C.C. This conclusion, respondent contends, is untenable, for the following reasons:

In the first place, A. Cimpi Express Lines was, and is, a New York firm, having its principal place of business and main garage at Auburn, New York. There is no dispute as to the fact that this motor carrier operated intrastate, as well as interstate. It was licensed for intrastate operation under the provisions of the Public Service

Law of New York, and held a permit for such operation under the rules and regulations of the P.S.C. Necessarily, this required said carrier to file and maintain the statutory required policy with the P.S.C. Nowhere in the statute itself, and certainly not from any sound reason of public policy, does it appear that such motor carrier shall have *only* the *minimum* insurance coverage. By the same token, there is nothing to prevent such carrier from maintaining as many policies, and in such amount, as it deems fit and proper, for its protection, and the protection of the public. There appears no sound reason for the petitioner to argue that such a carrier is restricted to insurance *only* in the *minimum* amount required, either under P.S.C. or I.C.C. regulations.

It is obvious that the P.S.C. had control over Cimpi as an intrastate operator, regardless of whether or not this carrier also operated interstate. The P.S.C. requirements are *independent of, not in addition to,* the I.C.C. requirements. The contractual relationship under the policy, as between the insurance carrier and the beneficiaries thereof, was not changed by the interstate character of the particular trip in question. The insurance carrier writing this policy could have put such a clause in the contract, but did not. It is well settled that such policies must be construed most strongly against the insurer.

Furthermore, it clearly appears from the Federal statute, and the cases interpretative thereof, that the Interstate Commerce Commission recognized the concurrent control and rights of the P.S.C., as to motor carriers operating within the boundaries of its own State. The accident in question did happen in the State of New York and the Public Service Commission of the State of New York had jurisdiction, and the laws of New York apply, regardless of whether or not the regulations of the Interstate Commerce Commission concurrently applied. Chapter 8, In-

terstate Commerce Act, Part II; Motor Carriers, as amended September 18, 1940 (being Title 49, United States Code Annotated, Sections 301, *et seq.*), clearly indicates that the jurisdiction of the I.C.C. is not exclusive, and that individual State Law is preserved thereunder. We quote from said Act as follows:

> "SEC. 302:
>
> "(b) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

The U. S. Supreme Court has upheld the validity of State statutes which overlap, though they do not contradict the Federal Motor Carrier Act. In *Maurer vs. Hamilton* (1940), 309 U. S. at page 598, we find:

> "As a matter of statutory construction, Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is especially the case when public safety and health are concerned. * * *"

To the same effect is *Eicholz vs. Public Service Comm.* (1939), 306 U. S. 268, and we quote therefrom (p. 274) as follows:

> "Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation." (citing cases.) * * * "That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid.

> See *Lone Star Gas Co. vs. Texas*, 304 U. S. 224, 238, 82 L. ed. 1304, 1314, 58 S. Ct. 883. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected" (citing additional cases).

And further:

> "The validity of the requirement of such a certificate to promote the proper and safe use of the State highways is not open to question. * * *"

If it could be said that a policy such as this becomes suspended and ineffective, every time that a New York carrier left the State of New York, even though he has an accident in the State of New York while on his way home, confusion and chaos would result. Familiar illustrations may be drawn from analogous situations, in interstate commerce, viz.: For example, the average railroad carrier is clearly under the jurisdiction of the I.C.C. Nevertheless, it is familiar and well settled law that the Public Service Commission of any state retains jurisdiction for certain purposes over such carrier, e. g.: The State has a right to exact franchise taxes from such a railroad, for the use and maintenance of public crossings. It has a right to enact and enforce its own regulations as to speed in certain zones, maintenance of signals, crossing protection and similar matters concerned with the safety and protection of the public. Surely, Congress never intended to divest the States of all control over an interstate carrier, for all purposes. The case here presented is obviously one of those established exceptions.

The home and place of business of A. Cimpi Express Lines, Inc. (the insured owner), was at Auburn, N. Y. Its tractors and trailers, including the vehicle in question,

were regularly garaged and maintained there (fols. 851, 857). The round trip, of which this particular operation was a part, was from Auburn to New York City (fols. 851, 857, 858), and returning to Auburn. True, the accident interrupted the return to the home garage, but it is perfectly obvious that Carnicelli was directly on his way home, by the shortest route, via Route 17 to Binghamton, and thence to Auburn (fols. 858, 859). This route, running through Seneca Falls, would mean only a slight deviation to deliver the navy materials at Sampson Naval Base, picked up on the return trip under the War Emergency rulings (fols. 581-585, 830-831; Plaintiff's Exhibit 12). The slight detour via Newark, returning from Brooklyn, does not alter the fact that the vehicle, at the time of the accident, was on its most direct route home, and (to use the language of P.S.C., Form 4) was then and there being operated "within the boundaries of the State of New York." The accident, it is conceded, occurred about a mile west of Goshen, New York, on Route 17 (fols. 576-577). This point is at least 25 miles within the State of New York, from the point where the Cimpi vehicle had re-entered New York, after detouring into New Jersey.

Distinguishing the Cases Cited by Petitioner

In *Central Greyhound Lines vs. Mealey*, 334 U. S. 653 (1947), New York State was seeking to tax the *total* receipts from motor transportation, of which nearly 43 per cent of the mileage routes lay in New Jersey and Pennsylvania. As was said in the prevailing opinion of the United States Supreme Court: "We are not dealing with a necessary deviation, or a calculated detour." And further, this Court said: "The tax may be fairly apportioned to the business done within the State by a fair method of apportionment." Hence, this case clearly recognizes the proper retention of control by a State over traffic within its boundaries.

McGoldrick vs. Gulf Oil Company, 309 U. S. 414 (1940), dealt with the State power to tax imports in *foreign* commerce, holding that such must be treated as a "duty" under the Tariff Act of 1930. Hence, we submit that this case is not analogous to ours.

New York Central Railroad Co. vs. Winfield, 244 U. S. 147, dealt with the compensation for an injured railroad employee engaged in interstate commerce. There the Federal Employers Liability Act applied, to the complete exclusion of the State Workmen's Compensation Law. In that instance, no room was left for the application of state compensation law. In other words, the "statutory purpose" there was clearly mandatory and exclusive.

If the inferences sought to be drawn by petitioner were carried to the ultimate conclusion, it might as well be said that, once a motor carrier unit had left the State, when it returns thereto the State can no longer have any control or regulation over such a vehicle, nor say what highways it shall use, at what speed it shall travel, or what regulations it shall observe. When we remember that the statute in question is one designed primarily "for the protection of the public," it should be obvious that it definitely falls within the class reserved to the jurisdiction of the State.

It would make a chaotic and uncertain state of affairs, if the inferences sought to be raised by the petitioner were adopted. For instance, let us picture the following illustration: Assume a New York motor carrier, doing no regular interstate business requiring him to have an I.C.C. certificate and insurance thereunder, holds a New York P.S.C. permit, with the *required policy* filed thereon. Assume, further (as in our case), that his said insurance policy is expressly endorsed to permit occasional trips into neighboring states. Suppose, now, that he leaves the State of New York, makes a delivery in

New Jersey, and then, on his homeward route, causes an accident within the State of New York, when almost home. Technically, and in the abstract, his operation took on the character of interstate commerce. Whereupon, his insurance carrier might say: "That was an interstate trip. We filed our policy only in connection with your New York State permit. The P.S.C. has no jurisdiction over interstate commerce; *ergo,* we disclaim any liability." Such reasoning would not only be fallacious, but would emasculate and defeat the very purpose of the New York Public Service Law, in particular the aforesaid section which is designed *for the protection of the public.*

POINT II.

The judgment in question is not one properly subject to review by this Court.

We venture to suggest that the affirmative defenses as to interstate commerce, raised by New Amsterdam in its answer below, were specious, sham and frivolous, injected solely for the purpose of lending to the case the color of a Federal question. As such, they were properly overruled by the State Court.

In its final motion to the New York Court of Appeals, seeking for re-argument of the appeal, the petitioner also moved, in the alternative,

> "(b) for an order recalling the remittitur herein and amending the same by adding thereto substantially the following:
>
> "A question under the Federal Constitution was presented and passed upon by this Court, namely, whether Article 3-B of the Public Service Law of the State of New York, as construed by the Supreme Court and the Appellate Division of the Supreme

> Court, is repugnant to the interstate commerce provision of the Federal Constitution, Article I, Section 8. * * *"

This application was denied by said Court of Appeals, without opinion.

The United States Supreme Court may not undertake to review the decision of a State Court, unless it affirmatively appears from the record, not only that the federal question involved was presented to the highest State Court having jurisdiction, but that its decision of the federal question was necessary to determination of the cause.

> *Honeyman vs. Hanan*, 300 U. S. 14 (1937), appeal dismissed 302 U. S. 375.
> *Southwestern Bell Telephone Co. vs. State of Oklahoma*, 303 U. S. 206 (1938).

Where the judgment sought to be reviewed may rest upon two grounds, one of which is Federal and the other non-Federal in character, the United States Court's jurisdiction fails if the non-Federal ground is independent of the Federal ground and adequate to support the judgment.

> *Fox Film Corp. vs. Muller*, 296 U. S. 207 (1935).
> *St. Louis S. W. R. R. vs. City of Tyler*, 212 U. S. 552 (1908).
> *Kansas City Star vs. Julian*, 215 U. S. 589 (1909).
> *Ward vs. Board of Com's'rs*, 253 U. S. 17 (1920).
> *McCoy vs. Shaw*, 277 U. S. 302 (1928).

Whitney vs. People of California, 274 U. S. 357 (1927), at page 360:

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court" (followed by citations).

To the same effect are:

Mellon vs. O'Neil, 275 U. S. 212 (1927).

Lynch, et al., vs. N. Y. ex rel. Pierson, 293 U. S. 53 (1934), quoting from pages 54-55:

> "It is essential to the jurisdiction of this court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *DeSaussure vs. Gaillard,* 127 U. S. 216, 2[illegible] 32 L. ed. 125, 132, 8 S. Ct. 1053; *Johnson vs. Risk,* 137 U. S. 300, 306, 307, 34 L. ed. 683, 686, 11 S. Ct. 111; *Walter A. Wood Mowing & Reaping Mach. Co. vs. Skinner,* 139 U. S. 293, 295, 297, 35 L. ed. 193-197, 11 S. Ct. 528; *Eustis vs. Bolles,* 150 U. S. 361, 366, 367, 37 L. ed. 1111, 1112, 14 S. Ct. 131; *Whitney vs. California,* 274 U. S. 357, 360, 361, 71 L. ed. 1095, 1098, 1099, 47 S. Ct. 641; *Mellon vs. O'Neil,* 275 U. S. 212, 214, 72 L. ed. 245, 246, 48 S. Ct. 62. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. *Allen vs. Arguimbau,* 198 U. S. 149, 154, 155, 49 L. ed. 990, 993, 25 S. Ct. 622; *Johnson vs. Risk,* 137 U. S. 300, 34 L. ed. 683, 11 S. Ct. 111, *supra*; *Walter A. Wood Mowing & Reaping Mach. Co. vs. Skinner,* 139 U. S. 293, 35 L. ed. 193, 11 S. Ct. 528, *supra*; *Consolidated Turnp. Co. vs. Norfolk & O. V. R. Co.,* 228 U. S. 596, 599, 57 L. ed. 982, 983, 33 S. Ct. 605; *Cuyahoga River Power Co. vs. Northern Realty Co.,* 244 U. S. 300, 302, 304, 61 L. ed. 1153, 1157, 1158, 37 S. Ct. 643."

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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